

ARKANSAS COURT OF APPEALS

DIVISION II
No. CACR08-1249

JOSE ELIAS AREVALO,

APPELLANT

V.

STATE OF ARKANSAS,

APPELLEE

Opinion Delivered MAY 20, 2009

APPEAL FROM THE BENTON
COUNTY CIRCUIT COURT,
[NO. CR-07-825-2]

HONORABLE DAVID CLINGER,
JUDGE

AFFIRMED

KAREN R. BAKER, Judge

A Benton County jury convicted appellant Jose Arevalo of rape and sentenced him to a term of thirteen years in the Arkansas Department of Correction. His sole challenge on appeal is that the trial court abused its discretion in allowing the admission of a photograph of the victim depicting her as she appeared at the time the crime occurred. We find no error and affirm.

In discussing our standard of review for evidentiary rulings, we have said that circuit courts have broad discretion and that a circuit court's ruling on the admissibility of evidence will not be reversed absent an abuse of that discretion. *Green v. AlphaPharma, Inc.*, 373 Ark. 378, --- S.W.3d ---- (2008). In the State's case-in-chief, it sought to introduce a school photograph of the victim at the age of thirteen, near the time appellant was alleged to have committed the rape.

Appellant argues that the photograph was irrelevant because it had no tendency to

make any fact that is of consequence to the determination of the action more or less probable. As a general matter, all relevant evidence is admissible. Ark. R. Evid. 402. Relevant evidence is evidence that has a tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. *Williams v. State*, 374 Ark. 282, ___S.W.3d ___(2008); Ark. R. Evid. 401. Appellant claims that the testimony of the victim, that she was thirteen at the time of the rape, was sufficient to establish the age and appearance of the victim at the time of the alleged crime. However, the State is entitled to prove its case as conclusively as it can. *Regalado v. State*, 331 Ark. 326, 961 S.W.2d 739 (1998). The mere fact that a photograph is cumulative is not, standing alone, sufficient reason to exclude it. *Williams, supra*.

Additionally, appellant asserts that the admission of the photograph was prejudicial, arguing that the State's justification for presenting the photograph to the jury was for the sole purpose of inflaming the jury's emotions toward appellant by viewing the picture of the victim as a young girl at the time of the rape. The photograph tended to corroborate the age of the victim through both her appearance and identification of the school year in which the crime occurred.

Evidence, although relevant, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Ark. R. Evid. 403. However, appellant's argument misconstrues the definition of prejudice as it relates to the exclusion of evidence. In one sense, all evidence is presumably prejudicial, or it would not be relevant; but Rule 403 only excludes evidence that is *unfairly* prejudicial. *Lindsey v. State*, 319 Ark. 132, 890 S.W.2d

584 (1994); *Marvel v. Parker*, 317 Ark. 232, 878 S.W.2d 364 (1994). Rule 403 involves balancing, on the one side, the evidence's probative value and, on the other side, the evidence's dangers, including its unfairly prejudicial and misleading nature. In *Berry v. State*, 290 Ark. 223, 233, 718 S.W.2d 447, 453 (1986), the Arkansas Supreme Court defined "unfair prejudice" as an "undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."

The photograph in this case had some probative value as it tended to corroborate the age of the victim through both her appearance and identification of the school year in which the crime occurred. The only prejudice appellant alludes to is inflaming the jury's emotions based on the youth of the victim. However, the victim's youth was an element of the charge the State was required to prove. At trial appellant's counsel stated that the victim appeared more mature at the CAC interview than in the photograph. Following counsel's statement, the trial court ruled that the photograph would be admitted observing that the victim's appearance at the time of trial when she was seventeen was different than she appeared when the crime took place at the age of thirteen.

We do not find that the trial court's admission of the photograph in this circumstance was an abuse of discretion. This high threshold does not simply require error in the trial court's decision but rather that the trial court act improvidently, thoughtlessly, or without due consideration. *Williams, supra*; *Grant v. State*, 357 Ark. 91, 161 S.W.3d 785 (2004).

Affirmed.

HART and ROBBINS, JJ., agree.

